In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75919

JOE ROSATO, WILLIAM K. PATTERSON,
GEORGE F. GRUNER and JIM BORT,
Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF FRESNO,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari

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I.

QUESTIONS PRESENTED

The respondent Superior Court views the questions presented as follows:

1. Whether there is any conflict in the cases, requiring resolution by this Court, as to the standard to be followed by trial courts in issuing protective orders re publicity.

2. Whether this Court should issue an advisory opinion regarding a newsperson's conditional First Amendment privilege.

3. Whether an interpretation by California courts that a California statute violates the California Constitution presents an issue reviewable by this Court.

4. Whether petitioners were accorded due process when called as witnesses in a hearing before the respondent court.

II.

STATEMENT OF THE CASE

Petitioners in this case are newsmen for The Fresno Bee, a daily newspaper in Fresno, California. Respondent is the Superior Court of Fresno County. Petitioners were held in contempt by the Superior Court for refusing to answer questions asked of them during the course of an investigation into the apparent violation of a protective order re publicity entered by that court in a criminal case. The questions petitioners refused to answer, and which the California Court of Appeal, Fifth Appellate District, ruled they were required to respond to, were framed to ascertain only if the newsmen's news source was a person subject to and in violation of the Court's order.

In October 1974 the Fresno County Grand Jury jointly indicted Fresno City Councilman Marc Stefano, land developer Julius Aluisi and former City of Fresno Planning Commissioner Norman Bains on counts of bribery and conspiracy. The original and four copies of the grand jury transcript were delivered by the court reporter to the county clerk, who in turn delivered one copy to the district attorney, one copy to the defendant Stefano, one copy to the attorney for defendant Aluisi, and one copy to the Assistant Public Defender who was the attorney for defendant Bains. The

original was retained in the county clerk's safe except when it was in possession of the court. (Opinion, 51 Cal.App.3d at 199-200)[1]

On November 13, 1974, defendant Aluisi's attorney made an oral motion before the respondent court to seal the grand jury transcript on the ground that there would be extensive adverse publicity prejudicing his client if the transcript became public. The district attorney did not oppose the motion and the court took the matter under submission. (RT of Hearing, November 13, 1974, p. 2-7). On November 21, 1974, one day before the grand jury transcript normally would have been made public, the other two defendants joined in Aluisi's motion. Again, the district attorney did not oppose the motion and the motion was granted. All three defendants then moved the court to issue a broader protective order re publicity. (RT of Hearing, November 21, 1974, p. 2-4) On November 22, 1974, the court issued such an order. (RT of Hearing, November 22, 1974, p. 2-7)

That order, after reciting the necessity to protect the defendants' right to due process of law and to a fair trial and noting that "it further appearing to the Court that the dissemination by any means of public communication of any out-of-court statements relating to this case may interfere with the constitutional right of the defendants to a fair trial and disrupt the proper administration of justice . . ." directed that no party, attorney, judicial officer or employee, law enforcement officer, grand juror, witness before the grand jury nor any person subpoenaed to testify at trial should make any out of court statements regarding

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1. The opinion of the California Court of Appeal, Fifth Appellate District, is reproduced as Exhibit A in the Appendix to the petitioning newsmen's brief. The opinion contains most of the relevant facts.

the evidence in the case. (Opinion, 51 Cal.App.3d at 200-201)[2]

Defendant Stefano's motion for change of venue in the criminal matter was granted on January 3, 1975, and a like motion was granted upon the motion of defendant Aluisi on January 7, 1975. Defendant Bains' criminal trial was never transferred from Fresno County (Opinion, 51 Cal. App.3d at 201).

On January 12, 13 and 14, 1975, stories under petitioners Rosato's and Patterson's bylines appeared on the front page of The Fresno Bee quoting extensively from the sealed grand jury transcript. (Opinion, 51 Cal.App.3d at 201)

It appearing to the respondent court that there had been a violation of the court orders, the court directed the county counsel to represent the court in proceedings concerning the apparent violation of its orders. The hearings were held on January 24 and 27, February 6, April 21 and 23, 1975.

Petitioners Rosato and Patterson, reporters for The Fresno Bee, and Gruner, Managing Editor of The Bee, were served with a subpoena duces tecum directing them to produce at the hearings any copy of the grand jury transcript which they might have in their possession or under their control. A motion to quash the subpoena was filed by their counsel, and in support thereof, a declaration of petitioner Gruner which alleged that the articles were derived from confidential news sources; Gruner did not produce the transcript. The court denied the motion to quash. One of the contempt citations was based upon Gruner's failure to produce the transcript. (Opinion, 51 Cal.App.3d at 201-202)

2. The two court orders will be referred to hereafter in the singular for simplicity.

Prior to calling petitioners as witnesses at the hearings, the assistant county counsel called 13 witnesses who had lawful access to the grand jury transcript and who were subject to the court order. During the direct examination of all witnesses, petitioners and all other witnesses were excluded from the courtroom except when they themselves were testifying. Counsel for petitioners, though, were permitted to remain in the courtroom and were allowed to cross-examine witnesses through a procedure whereby questions would be submitted to the assistant county counsel to be asked by him at his discretion.

Each of these 13 witnesses testified that he or she had no knowledge or information as to how any newsperson obtained a copy of any portion of the grand jury transcript.

Thereupon, petitioners Rosato, Patterson and Gruner were called as witnesses, each of whom was permitted to consult frequently with his counsel, and each of whom was informed of the identity of the prior witnesses and of their statements and of the fact that each prior witness had testified that he had no objection to the disclosure by newsmen of the source of The Fresno Bee articles. (Opinion, 51 Cal.App.3d at 202-203)

Each of the three petitioners, Rosato, Patterson and Gruner, testified that he did not obtain the "source material" for the articles from one of the persons subject to the protective order. All four of the petitioners, however, refused to answer numerous specific questions framed to determine if the "source material" had in fact come from such a person. (Opinion, 51 Cal.App.3d at 203-205)[3]

As a consequence of refusing to answer questions during the hearings, Rosato was cited 26 times for contempt, Pat-

3. The specific questions the petitioning newsmen refused to answer are listed in the Opinion at 51 Cal.App.3d at 242-247.

terson was cited 25 times, Gruner was cited 5 times, and Bort was cited 17 times.

Upon review of the sentences, the California Court of Appeal for The Fifth Appellate District annulled 18 of those citations and affirmed as to the balance. The case was ordered remanded to allow petitioners the opportunity to purge their contempts. (Opinion, 51 Cal.App.3d at 231)

III.

THERE IS NO CONFLICT IN THE CASES REGARDING THE ENTRY OF PROTECTIVE ORDERS

In their first point, the newsmen argue that a conflict exists between various California courts and federal Courts of Appeal as to the appropriate standard to be used by the trial courts in determining whether the entry of a protective order is justified. They contend that some courts require that potential publicity present a clear present danger to the fair administration of justice before a protective order is entered, whereas other courts have concluded that a protective order is warranted where there is a reasonable likelihood of publicity tending to prevent a fair trial.

A cursory reading of the relevant cases leads one to the conclusion that there is in fact no conflict. The two different tests, to the extent that the articulation of them even expresses a substantive difference, have arisen out of and been consistently applied in different categories of factual settings. The "clear present danger" test has been used when there was a prior restraint made specifically applicable to publication by the news media, and it has been used in cases where overbroad local court rules or court orders were drawn up restricting comment by various persons without regard to the nature of the particular case, without limitations on the degree of restrictions upon speech, and with little or no regard for who was subject

or not subject to the particular rule or order. In contrast to these two factual settings, the "reasonable likelihood of publicity tending to prevent a fair trial" test has been used in criminal cases where the order was requested by one or both parties, where the order restrained only those persons connected with the case and under the jurisdiction of the court, where the order was narrowly and specifically drawn as to the type of comment prohibited, and where there was no attempt to impose a specific or direct prior restraint upon the press.

The present case falls within the latter category. The California Court of Appeal for the Fifth Appellate District held in this case that:

> "The judge need only be satisfied that there is a reasonable likelihood of prejudicial news which would make difficult the impaneling of an impartial jury and tend to prevent a fair trial." (51 Cal.App.3d at 208)

It is important to note that the order in this case in no way purported to be a restraint upon publication by the press and was never treated as such; it was directed only to officers of the court, law enforcement personnel and witnesses in a criminal case, and furthermore, it was consented to by the defense counsel for the criminal defendants and it was unopposed by the District Attorney. The nature of comment restricted by the order was clearly and specifically set forth, and the scope of the restriction was narrowly drawn so as to prohibit only comment that in fact would have created a reasonable likelihood of prejudicial news. (Order is reproduced at 51 Cal.App.3d at 200-201.) The order was issued only after multiple motions by the criminal defendants and after careful consideration by the trial court.

The only other California case to have carefully considered this issue extensively analyzed the relevant federal cases and also concluded that a reasonable likelihood of publicity tending to prevent a fair trial was the appropriate test. (*Younger v. Smith* [1973] 30 Cal.App.3d 138, 158-164, 106 Cal.Rptr. 225, 238-243) The *Younger* court pointed out that protective orders must be geared to the apparent needs of the moment and judged with that necessity in mind, and that they are subject to continuing review based on changed conditions.[4]

Consistent with the California cases is *United States v. Tijerina* (10th Cir. 1969) 412 F.2d 661, where, in a criminal case, the defendant suggested that a protective order be entered restricting extrajudicial comment by the parties. Upon later challenge of the order, the Court of Appeal for the Tenth Circuit upheld the order under a "reasonable likelihood" test (412 F.2d at 666)

The federal cases employing a "clear and imminent danger to the fair administration of justice" test to measure protective orders were concerned with vastly different circumstances than was the court in the present case, in *Younger v. Smith, supra,* or in *United States v. Tijerina, supra.*

In two of the federal Court of Appeal cases cited by the newsmen, the court orders in question were prior restraints made specifically applicable to the news media. In *Dorfman v. Meiszner* (7th Cir. 1970) 430 F.2d 558, a court

4. The other California cases cited by the newsmen are inapposite. In *Hamilton v. Municipal Court* (1969) 270 Cal.App.2d 797, 801-802, 76 Cal.Rptr. 168, 171, the court found the clear and present danger test to be satisfied without addressing the issue as to *which* test was appropriate. In *Sun Co. of San Bernardino v. Superior Court* (1973) 29 Cal.App.3d 815, 829, 105 Cal.Rptr. 873, 883, the protective order purported to be a direct restraint on what the press could published.

rule prohibited news photography and broadcasting in numerous areas of a twenty-seven floor building in which the court was located, including entire floors which contained non-court federal offices, a large public lobby, and an open outdoor plaza. In *United States v. Columbia Broadcasting System, Inc.* (5th Cir. 1974) 497 F.2d 102, a federal distict court attempted to prohibit a television news artist from making and publishing sketches of criminal trial proceedings without regard to whether the sketches were made within or without the courtroom and without regard to the content of the sketches. Without a doubt, the appropriate standard to use in evaluating the validity of these direct prior restraints on the news media was the "clear and present" or "clear and imminent danger" test. There was, however, no such direct prior restraint upon publication in the present case.

Four of the federal cases cited by the newsmen involved court orders which were vague and overbroad and purported to restrict comment by attorneys. Three of these four cases arose out of the seventh circuit. In *Chase v. Robson* (7th Cir. 1970) 435 F.2d 1059, an order was entered that prohibited the attorneys and parties in the case from making virtually *any* public statement, however innocuous, about the case. The order was challenged by a defendant and the court held it was overbroad and constitutionally impermissible under either the "reasonable likelihood" or the "clear and present danger" test. In *In re Oliver* (7th Cir. 1971) 452 F.2d 111, a district court rule contained a blanket prohibition of all extrajudicial comment by counsel in *all* pending cases, criminal and civil, whether tried before the court or a jury and without regard to whether the comment was or even could have been prejudicial to the fair administration of justice; upon challenge by an affected

attorney, the rule was held to be void on its face. In *Chicago Council of Lawyers v. Bauer* (7th Cir. 1975) 522 F.2d 242 attorneys challenged a similar local court rule. Again the seventh circuit held that there could not be a *blanket* prohibition of attorneys' comments without a consideration of whether particular statements posed a serious and imminent threat of interference with a fair trial; this court rule included within its prohibition even innocuous statements. The *Bauer* court was particularly concerned because the rule drew no distinction between civil and criminal trials; it pointed out that restrictions on speech are more justifiable in criminal trials. In the fourth case of this genre, the sixth circuit was faced with an order in a civil trial that swept even broader than did the court rules in the seventh circuit cases. In *CBS, Inc. v. Young* (6th Cir. 1975) 522 F.2d 234, in a civil trial arising out of the Kent State killings, the district court entered an order prohibiting *relatives, close friends, and associates* of the parties to the action from discussing the case *in any manner* with the news media or the public. The appellate court noted that this was a civil trial and held that the overbroad order could not measure up to the "clear and present danger test."[5]

Thus, while the "clear and present danger" test is required in some situations, notably where there is a direct prior restraint upon publication (e.g. *United States v.*

5. The petitioning newsmen assert that the ninth circuit held in *Farr v. Pitchess* (9th Cir. 1975) 522 F.2d 464, 468, that a protective order was valid if the release of information "might interfere with the right of the defendant to a fair trial". Petitioners contend that this language demonstrated that the ninth circuit adheres to a third test for entry of protective orders. There is no merit to this contention. The *Farr* court was not even presented with this issue; it was merely discussing in dicta, in general terms, the obligation upon a trial court to see that the *Sheppard* mandate (*Sheppard v. Maxwell* (1966) 384 U.S. 333) is carried out.

Columbia Broadcasting System, Inc., supra, 522 F.2d 234), and it may be permissible in many situations, it is certainly not the required test in a factual setting as was present in the instant case. In *Sheppard v. Maxwell* (1966) 384 U. S. 333, this court stated that "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case", transfer it to another county, or sequester the jury. This court went on to say that trial courts must protect their processes from prejudicial outside interferences by rules and regulations, and that "[n]either prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function." (384 U.S. at 363). In *Estes v. Texas* (1965) 381 U. S. 532, 540, this court characterized the preservation of a fair trial as "the most fundamental of all freedoms" and said that it "must be maintained at all costs". The protective order approved of in the present case was in clear compliance with *Sheppard* and *Estes*.

The petitioning newsmen herein also seek to create and benefit from a coattail effect of *Nebraska Press Association v. Hugh Stuart, Judge District Court of Lincoln County, Nebraska*, cert granted, No. 75817 (1975) ..... U. S. ..... As this court is already aware, the *Nebraska* case involves a court order that restrains the press from reporting about testimony and evidence adduced at a preliminary hearing that was open to the public, and restrains the publication of certain other evidence that could become public prior to trial.

The differences between the *Nebraska* case and the present one are obvious and of critical importance. Nothing in the orders of the Fresno County Superior Court purported

to be, or had the effect of being, a direct prior restraint upon publication by the press. No member of the press was restrained by respondent's orders; in fact, the press was free to print whatever it wished to print, and in fact, it did that very thing. The petitioning newsmen were not held in contempt for publishing excerpts of the sealed grand jury transcript. They were held in contempt for refusing to answer questions relevant to the trial court's inquiry into who, if any of those subject to its jurisdiction, violated the court orders. The newsmen's plea has a hollow ring to it—the California Court of Appeal recognized their claim that they did not have to reveal a source who was a person *not* subject to the order (51 Cal.App.3d at 224-225). The newsmen have claimed all along that their source was such a person. If that in fact was the case, the newsmen, in answering approved questions, will risk nothing at all. Their source will be protected.[6]

IV.

THIS COURT SHOULD NOT ISSUE AN ADVISORY OPINION REGARDING A NEWSPERSON'S CONDITIONAL FIRST AMENDMENT PRIVILEGE

It is established beyond question that this court does not render advisory opinions, and as a corollary to that, this court does not review cases that are based upon adequate state grounds (*Herb v. Pitcairn* (1945) 324 U.S. 117, 125-126). These axioms are dispositive of the newsmen's contention that this case is an appropriate vehicle for the review of the scope of the newsperson's privilege to conceal the identity of confidential sources; this is so because the California Court of Appeal's decision was based upon an interpretation of the California shield law (California Evidence Code § 1070) and that interpretation upheld a statu-

6. Respondent does not concede that petitioners have standing at this stage of the proceedings to raise the issue of the validity of the protective order.

tory newsperson's privilege in terms so broad that it necessarily encompasses and goes beyond any conditional First Amendment newsperson's privilege. The state court's decision could have been based as easily upon a First Amendment rationale as upon the state ground.

In response to the newsmen's argument that they were absolutely privileged under California law to refuse to reveal their source, the California Court of Appeal held that the newsmen were required to respond to the court's inquiries "only when the questions asked may tend to identify who, if anyone, *among those subject to a court's order,* may have violated it." (51 Cal.App.3d at 224) Elaborating upon and qualifying this statement, the court said:

> "The shield law still remains as a protection against the revelation of all sources other than court officers, and a reporter cannot be required to divulge information which would tend to reveal any source other than those court officers subject to the orders issued by the court.
>
> The key to the application of the above enunciated test is a determination on a question-by-question basis as to whether or not the answer to a question may tend to endanger the revelation of a protected source. To this end, within the rather narrow constrictions described above and even in the face of denials that court officers were involved, questions may continue to be asked if the answers may reveal that the source of the information was a court officer. Evidence Code section 1070 would not protect a refusal to answer this type of question. However, should a question be overbroad, i.e., it might tend to reveal that either a court official *or* a protected source was involved in the newsperson's obtaining of the information, the privilege under Evidence Code section 1070 would apply. Furthermore, a court is not entitled to ask questions directed toward discovering where the information did *not* come from (other than as they pertain to court officials) in order

> to narrow the field of inquiry vis-a-vis the protected sources. The court is only entitled to ask questions directed toward affirmatively determining if the information did come from court officers or attaches." (51 Cal.App.3d at 224-225)

In an appendix to its opinion (51 Cal.App.3d at 242-247), the Court of Appeal specified question by question which of the trial court's inquiries the newsmen must answer and which they are privileged to decline to answer.

Thus, under the decision of the court below, newspersons in California are absolutely privileged to withhold the identities of their confidential sources save one exceptional circumstance—where the release of information by the source was in direct violation of a protective order entered by a court to preserve and protect a criminal defendant's right to a fair trial. If there is a conditional First Amendment right of newspersons to protect their confidential sources, it most certainly is included within the virtually absolute privilege granted under the California statute and upheld by the California Court of Appeal.

The petitioning newsmen, however, contend that there is not a sufficiently compelling state interest to justify this infringement upon their otherwise absolute statutory privilege or upon a conditional First Amendment privilege to protect confidential sources. They contend that because a change of venue had been granted to two of the three criminal defendants at the time they published their articles quoting from the grand jury transcript, that the criminal defendants were not prejudiced by the publicity, and therefore the trial court had no continuing interest in discovering whether a person subject to its jurisdiction had violated the protective order.

The arrogance of this contention is startling. At the time the articles were published, one of the criminal defendants

was still scheduled to stand trial in Fresno. The Court of Appeal reviewed the contents of the news articles and found the information therein to be highly prejudicial to that defendant and subject to substantial question as to admissibility. Furthermore, petitioners themselves testified that they wrote the articles quoting from the sealed grand jury transcript about one month before they were published; thus, any violation of the court order in leaking the transcript to the newsmen took place well before the other two criminal defendants were granted changes of venue. (51 Cal.App.3d at 209)

Notwithstanding the prejudice to those particular criminal defendants, it seems patently obvious that one state interest in inquiring into the violation of the order was to insure the integrity and credibility of trial courts' protective orders in the present case and in all future cases in which such orders are required. If the power of the trial court to proceed with this inquiry could have been defeated simply by denials of complicity by those subject to the order and a statement by the newsmen that their source was not such a person, there would simply be no point in ever again entering such an order.[7] The mandate of *Sheppard* and *Estes* would be unenforceable and consequently meaningless.

Furthermore, there is no real societal interest in protecting the source in this case if that source is a person subject to the protective order. The societal interest involved is to preserve the constitutional right to a fair trial. If the effect of the decision of the court below is to deter court officers or employees from violating court orders and

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7. Perjury by officers of the court or newsmen in such an inquiry is more than a theoretical possibility—it has occurred fairly recently in California. (See *Farr v. Superior Court* [1971] 22 Cal. App.3d 60, 99 Cal.Rptr. 342)

endangering citizens' right to a fair trial, then the inquiry held in the present case will be well justified.

Petitioners' further assertion, that their news stories were necessary to expose public corruption, is equally without merit. The implication throughout has been that only the unilateral acts of petitioners prevented the information in the grand jury transcript from being lost forever to the public. A point worth noting, however, is that the transcript was to be sealed only until the criminal trials were completed. Furthermore, at the time Stefano and Aluisi obtained changes of venue, nothing would have prevented petitioners from seeking a judicial modification of the protective order. Even though they were not subject to the order sealing the transcript, petitioners would have had standing to challenge it (*Craemer v. Superior Court* [1968] 265 C.A.2d 216, 218, n. 1, 71 Cal.Rptr. 193, 196). Petitioners were aware of the availability of this procedure (Opinion, 51 Cal.App.3d at 209, n. 10). Instead, petitioners took it upon themselves to balance the competing considerations and make public the contents of the sealed transcript.

Considering the broad scope of the privilege granted the newsmen under the California shield law, considering the compelling public interest in investigating violations of protective orders, and considering the non-existence of any real interest in protecting a court officer or employee who violated this protective order, it is clear that there is no First Amendment issue in this case worthy of review.

V.

PETITIONERS RAISE NO FEDERAL CONSTITUTIONAL ISSUE IN THEIR RELIANCE UPON A COMMENT IN A FOOTNOTE IN BRIDGES v. STATE OF CALIFORNIA

Despite its most diligent efforts, the respondent Superior Court fails to discern even a glimmer of a federal constitutional issue in the petitioning newsmen's third argument. The newsmen, misplacing their reliance upon a comment in a footnote[8] in *Bridges v. State of California* (1941), 314 U.S. 252, 261, n. 3, now argue that the Supreme Court of the United States is bound by a state legislative determination, that newsmen are absolutely privileged to protect confidential sources, *even though* that determination has been consistently ruled by the California courts to be in contravention of the California Constitution whenever the exercise of the privilege would interfere with the power of the court to control its own proceedings and officers. The newsmen's convoluted reasoning is, once again, merely an attempt to obtain a United States Supreme Court review of an issue turning solely on state law.

The newsmen state that "the California legislature has . . . made a finding of fact that [the] First Amendment issue predominates over other interests asserted in opposition to it" (Pet. for Cert. p. 18-19). The statement is inaccurate and irrelevant. First, the legislature made no finding of *fact;* it made a value judgment as to the weight

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8. In *Bridges v. State of California* (1941) 314 U.S. 252, 261 n. 3, this court was discussing whether the state legislature had enacted legislation relevant to the issues in the case; in a footnote, the court commented:

> "Indeed, the only evidence we have of the California legislature's appraisal indicates approval of a policy directly contrary to that here followed by the California courts. For Section 1209, subsection 13, of the California Code of Civil Procedure (1937 Ed.) provides: '. . . no speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings.' The California Supreme Court's decision that the statute is invalid under the California constitution is an authoritative determination of that point. But the inferences as to the legislature's appraisal of the danger arise from the enactment, and are therefore unchanged by the subsequent judicial treatment of the statute."

to be accorded various rights and privileges. Second, the fact that a state legislature has made certain value judgments, or even factual findings, gives it no license to enact laws in contravention of the state constitution. Third, the finding by two districts of the California Court of Appeal[9] that the California statute *is* in contravention of the state constitution does not present a federal question—it is strictly a matter of state law and the Court of Appeal's decision on this point can be reviewed only by the Supreme Court of California. Regarding this very point, this Court stated in *Branzburg v. Hayes* (1972) 408 U.S. 665, 706:

> It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute.

Nothing in the *Bridges* opinion supports the newsmen's argument. The holding in *Bridges* overturning judgments of contempt arose out of situations where trial courts attempted to punish (1) a labor union official for including in a telegram to the Secretary of Labor language critical of a judicial decision, and (2) newsmen for publishing editorials concerning judicial rulings. The holding had little if anything to do with a California statute speaking to the contempt power of a court (314 U.S. at 261 n. 3). It was, rather, as pure and simple a free speech case as there ever was. In the present case, however, no one was held in contempt for exercising their rights to speak and write freely. The petitioning newsmen were held in contempt for refusing to answer relevant questions in an investigation into an apparent violation by a court officer of a lawful court order.

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9. *Rosato v. Superior Court* (1975) 51 Cal.App.3d 190, 210-212; *Farr v. Superior Court* (1971) 22 Cal.App.3d 60, 69-70, 99 Cal.Rptr. 342, 347-348.

There being no federal question in the newsmen's third argument, review by this court would be inappropriate.

VI

THERE HAS BEEN NO VIOLATION OF THE NEWSMEN'S RIGHT TO DUE PROCESS

The newsmen contend that they were denied due process in the course of the trial court's inquiry into the apparent violation by a court officer of the protective order in that, when they were called as witnesses, they were not allowed to cross examine or to call other witnesses. They also assert that the inquiry abridged in some unspecified way their Fifth, Sixth and Fourteenth Amendment rights.

The facts do not bear out the newsmen's allegations. The newsmen were simply several of many witnesses in a judicial hearing, the sole purpose of which was to determine if any persons subject to a court order had violated that order. The newsmen were not defendants—they were accused of nothing—in fact, they were themselves not even subject to the order. The newsmen had notice of the nature and time of the proceedings. (Opinion, 51 Cal.App.3d at 229) Their counsel were present throughout the hearings and were allowed to submit additional questions to the other various witnesses through the Assistant County Counsel. (Opinion, 51 Cal.App.3d at 202) When the newsmen were called as witnesses, they were each informed of the identity of the prior witnesses and the contents of the prior testimony. While on the stand, the newsmen consulted frequently with counsel. (Opinion, 51 Cal.App.3d at 203) The questions sanctioned by the Court of Appeal that the newsmen refused to answer were framed only to determine if the source of the sealed grand jury transcript was a person subject to the court's protective order. (Opinion, 51 Cal.App.3d at 242-247) When newsman Rosato claimed that his answer to a question might tend to

incriminate him, he was immediately granted immunity from prosecution (RT of Hearing, January 24, 1975, p. 123-124, 127). The newsmen were given notice of the charges of contempt and an opportunity to be heard prior to the imposition of the sentences for contempts and they were given an opportunity to purge the contempts before sentences were passed. (Opinion, 51 Cal.App.3d at 229) Finally, the sentences imposed were coercive rather than punitive. (Opinion, 51 Cal.App.3d at 229-230)

Thus, it is clear that the newsmen were accorded many more rights and privileges in the course of the hearings than was required by the due process clause; in fact, the trial court was quite solicitous of their rights as witnesses. What the newsmen's real complaint boils down to is not that they were denied due process; it is that they were required to submit themselves to the processes of the law. While they may have found themselves in an uncomfortable situation, that situation was entirely of their own making. Even now, to avoid being sentenced for contempt, the newsmen need only return to court and answer those questions, permissible under the Court of Appeal's decision, that are framed to determine if a person subject to the court order violated that order.

VII.

CONCLUSION

The granting of certiorari in this case is unnecessary and would be inappropriate because (1) there is no substantive conflict in the cases regarding the standard for the entry of protective orders re publicity and there is little if any similarity between the facts and applicable principles of law in this case and those in *Nebraska Press Association v. Hugh Stuart, etc., supra*; (2) there is no need for an advisory opinion regarding a newsperson's conditional

First Amendment privilege; (3) the fact that California courts felt themselves free to interpret a California statute in light of the California constitution does not present a federal question; and (4) the respondent Court accorded the petitioning newsmen full due process of law when they appeared as witnesses before the court.

Dated: February 9, 1976

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